

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

725 EATERY CORP., etc., *et ano.*, :
Plaintiffs, :

- against -

THE CITY OF NEW YORK, et al., :
Defendants. :

-----X

59 MURRAY ENTERPRISES INC., etc., *et al.*, :
Plaintiffs, :

- against -

THE CITY OF NEW YORK, et al., :
Defendants. :

-----X

CLUB AT 60TH STREET, INC., etc., *et al.*, :
Plaintiffs, :

- against -

THE CITY OF NEW YORK, :
Defendant. :

-----X

336 LLC., etc., *et al.*, :
Plaintiffs, :

- against -

THE CITY OF NEW YORK, :
Defendant. :

-----X

Civil Action No.
02 CV 4431 (WHP)

Civil Action No.
02 CV 4432 (WHP)

Civil Action No.
02 CV 8333 (WHP)

Civil Action No.
18 CV 3732 (WHP)

**NOTICE OF FILING OF PLAINTIFFS' JOINT REPLY APPENDIX (Vol. II of
IV) IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

PLEASE TAKE NOTICE, that Plaintiffs hereby file following Joint Reply Appendix (Vol. II of IV) in support of their pending Motion for Preliminary Injunction in the above-captioned actions.

Dated: New York, New York
March 15, 2019

Respectfully,

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**PLAINTIFFS' JOINT REPLY APPENDIX (Vol. II of IV)
IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

PLAINTIFFS' JOINT REPLY APPENDIX
Vol. II of IV
(pp. 1982-2004)

Per the Court's Order of November 7, 2018, Plaintiffs in each of the four above-entitled actions hereby submit their unitary Joint Reply Appendix consisting exclusively of evidentiary documents upon which some or all of the Plaintiffs may choose to rely in their Reply to Defendant's Response to Plaintiffs' Motion for Preliminary Injunction. The inclusion of documents in this Joint Reply Appendix does not automatically signify an endorsement or promotion of any of these documents by any individual Plaintiff or group of Plaintiffs. That will depend on specific adoption of any of these documents by any Plaintiffs or Group of Plaintiffs in documents they may file with the Court.

The reference below to the "Club Plaintiffs" refers to all the Plaintiffs in Action Nos. 02 CV 4431, 02 CV 4432 and 02 CV 8333. The reference below to the "Bookstore Plaintiffs" refers to all the Plaintiffs in Action No. 18 CV 3732.

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Dated: New York, New York
March 15, 2019

Respectfully submitted,

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Civil Action No.
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Civil Action No.
02 CV 8333 (WHP)

**REPLY DECLARATION OF MICHAEL BERZAK RE SITES ISSUES PRESENTED IN
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

MICHAEL BERZAK, hereby declares the following pursuant to 28 USC §1746:

1. I, Michael David Berzak, have personal knowledge of each of the facts stated herein. I make this declaration in response to statements regarding the “sites” issues in this case as discussed in the Declaration of Anita Laremont, the Executive Director of the New York

Department of City Planning (“Laremont Declaration”) filed by the City in these cases on January 31, 2019.

2. All references herein to my “Sites Declaration” are to the Declaration of Michael Berzak Regarding Adult Business Sites in Support of Plaintiffs’ Motion for Preliminary Injunction, which is item A in Plaintiffs’ Joint Appendix (PJA), starting at page 001.

OVERVIEW

3. In paragraph 35 of my Sites Declaration (found at pp. 14-15 of Volume 1 of Plaintiffs’ Joint Appendix), and as amended by my Supplemental and Correcting Declaration filed herein on January 2, 2019, I stated that I evaluated the City’s 1995 map of legally permissible and unencumbered sites for new adult businesses in Manhattan and found 85 currently legally permissible lots in Manhattan for adult eating and drinking establishments (hereafter “adult clubs”). Although I did not so explain in my original declaration, my intent was to convey that there were 85 sites which could *theoretically* be used for at least *some* type of commercial establishment, even if not an adult club. In determining those 85 lots, however, I intentionally erred on the side of overinclusion of questionable locations, so the City would have no conceivable basis to challenge locations I excluded.

4. I then identified each of these 85 locations by block and lot number in a spreadsheet prepared by Plaintiffs’ counsel which I was told would be given to the City so its experts could examine those lots. I was then informed that the chart had been given to the City and it had reviewed those lots.

5. In reviewing the exhibits to the Laremont Declaration, I see that the City, perhaps using different criteria, concluded that only 27 of the 85 lots I had identified were in fact both legally permissible and not encumbered in a manner to make them unavailable to any

commercial enterprise. I have reviewed the 58 of my original 85 lots I identified which the City excluded and fully accept the City's conclusion that only 27 of the lots I identified were both legally permissible and could *realistically* be occupied and operated by a new commercial business.

6. In Ms. Laremont's Declaration, she identified 12 other Manhattan lots as legally permissible and countable for adult businesses in *addition* to the 27 upon which we both agree. I had not identified those 12 lots and, after re-evaluating and personally re-inspecting each of them, respectfully disagree with her so characterizing all but one of them, Block 705, Lot 1 (described in paragraph 7-(7) below, City's Count # 23). Although legally permissible, that lot should nonetheless be excluded because, in my opinion, it would never conceivably be rented to any adult business. I conclude that there are only 28 legally permissible and unencumbered lots in Manhattan for relocating and establishing adult eating and drinking establishments and, as I will discuss below, far fewer lots which could *simultaneously* be occupied by adult businesses. An even smaller number would be commercially viable in that there would ever be a realistic possibility of their both being made *available* to an adult eating and drinking establishment or that the property or building would be deemed suitable to a reasonable potential owner of such a business. In addition, I understand that the City has been presented with my evaluation of these 12 sites, presented in detail below, and now has withdrawn its claim that three of them (numbered below as paragraphs 7-(2), (5) and (6)) should be counted as valid potential adult sites.

THE 12 ADDITIONAL MANHATTAN LOTS PROFFERED BY THE CITY

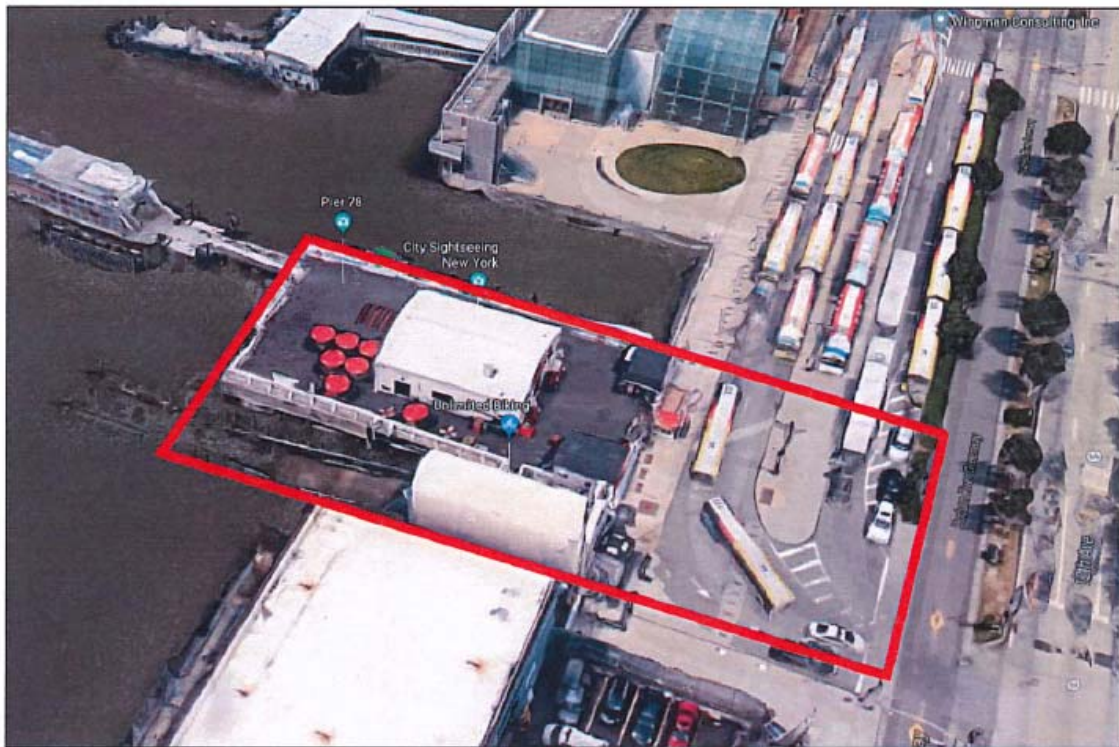
7. The City identified all of the permissible and unencumbered lots it found in Manhattan in a chart (Exhibit C to the Laremont declaration) and numbered them sequentially in

a column labeled “Count.” I describe below the 12 additional lots identified and characterized by Ms. Laremont as legally permissible and unencumbered, and include a reference to the City’s “Count” number as well as its block and lot number. In the descriptions below, if I agree a lot meets all of the City’s various *locational* restrictions, I refer to it as “legally permissible,” but then explain why I nonetheless believe that lot is not constitutionally countable. As a general approach in my evaluations, if I found a lot was shown on the City’s 1995 map of Manhattan as an encumbered lot, albeit a legally permissible one, I automatically excluded it without further analysis, and the results of these exclusions were shown graphically in Map 1-B accompanying my prior sites declaration. All references herein to my prior maps refer to the Manhattan map exhibits I prepared which are set forth in Exhibit 1 to my Sites Declaration. My Manhattan map exhibits are set forth therein at PJA pp. 19-30.

(1) **Block 665, Lot 11 (City’s Count # 13), Pier 78.** The City identified this lot in gold on its 1995 Map as permissible but “encumbered.” It remains in a legally permissible zone. It is not within 500 feet of any disqualifying zone or use. It remains encumbered today by a ferry landing and terminal on its West side and by roadways and pedestrian and bike paths on its East side. The roads are used for the parking and loading of buses for transport to and from the ferry. This lot should be excluded because it is fully encumbered and/or otherwise unavailable for any commercial use.

I show directly below selected photos of this lot, including both those which I took personally and one obtained from Google Earth, as well as a localized map showing both where this lot is located and the boundaries of this lot in a red border as an overlay to the map. The Google Earth photo also shows the lot boundaries in a red border.

(1) Block 665, Lot 11 (City's Count # 13), Pier 78:



LOOKING NORTH



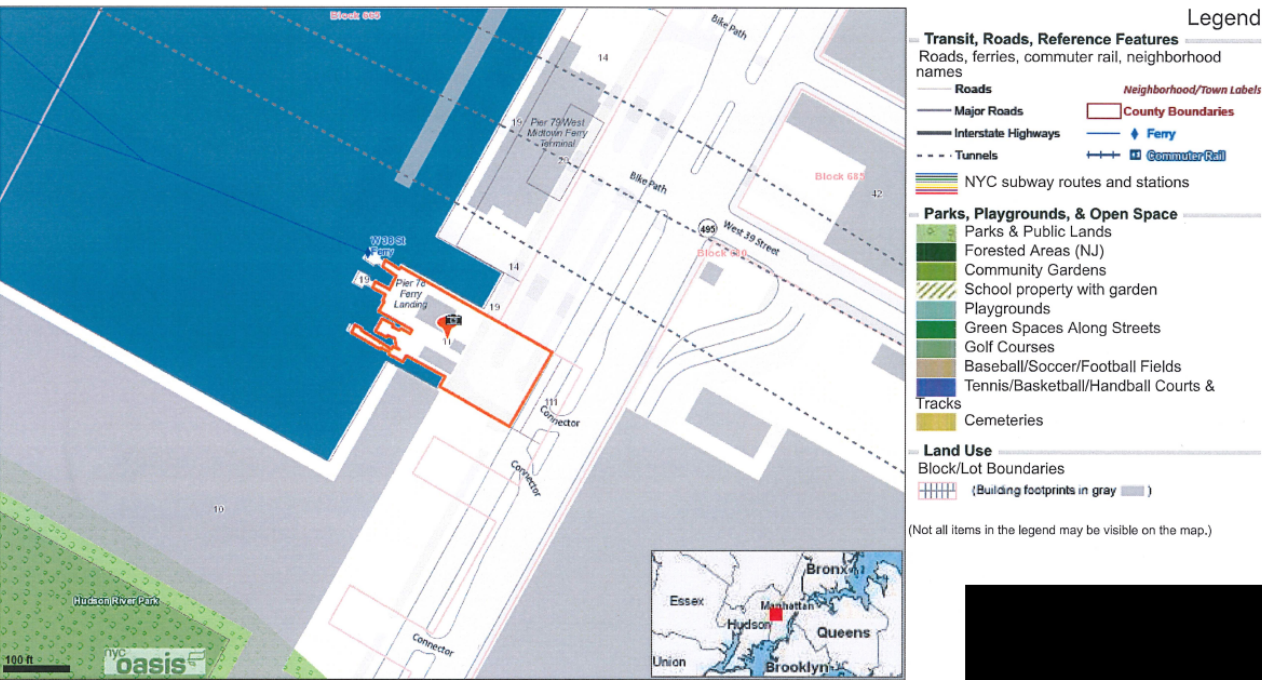
LOOKING SOUTH

(1) Block 665, Lot 11 (City's Count # 13), Pier 78:



LOOKING WEST

Block: 665, Lot: 11



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(2) **Block 665, Lot 111 (City's Count # 14) Pier 78.** The City identified this lot in gold on its 1995 Map as permissible but "encumbered." It remains in a legally permissible zone. It is not within 500 feet of any disqualifying zone or use. It remains encumbered today as it is entirely within the 12th Ave. (West Side Highway) median. This lot should be excluded because it is fully encumbered and/or otherwise unavailable for any commercial use.

I show directly below selected photos of this lot, including both those which I took personally and one obtained from Google Earth, as well as a localized map showing both where this lot is located and the boundaries of this lot in a red border as an overlay to the map. The Google Earth photo also shows the lot boundaries in a red border.



LOOKING NORTH

(2) Block 665, Lot 111 (City's Count # 14) Pier 78:



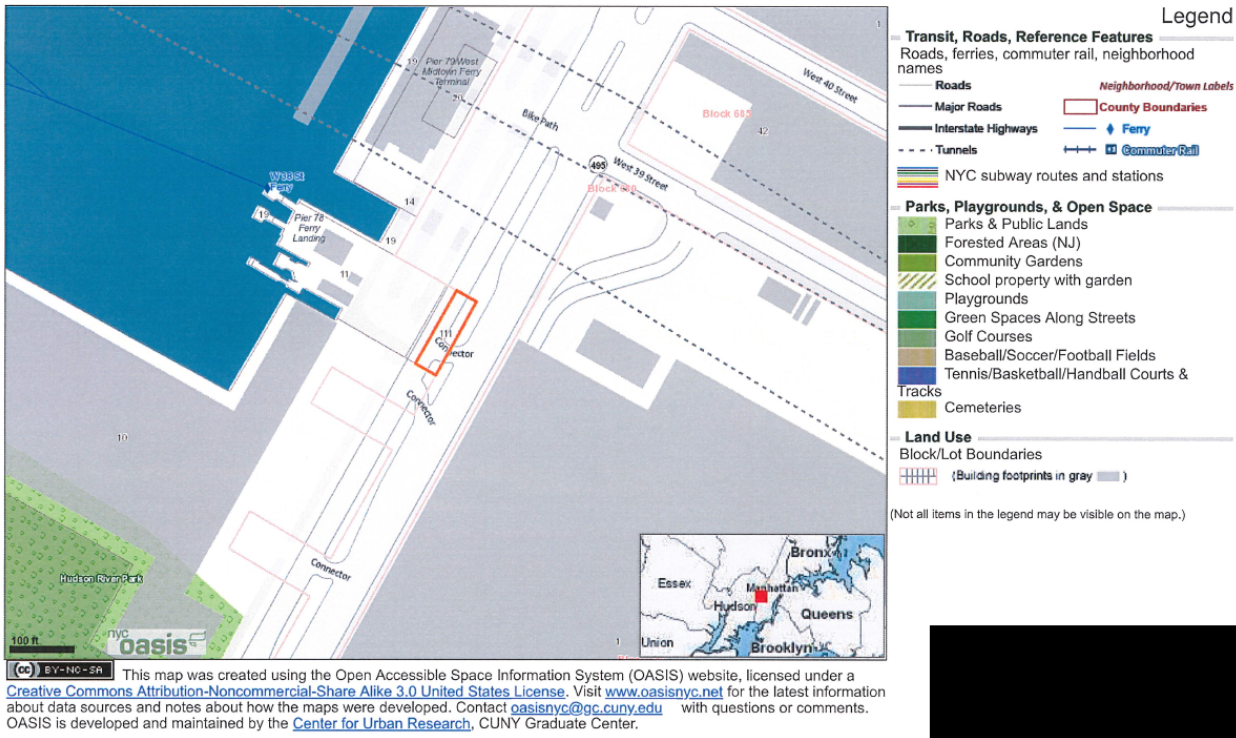
LOOKING SOUTH



LOOKING EAST

(2) Block 665, Lot 111 (City's Count # 14) Pier 78:

Block: 665, Lot: 111



(3) **Block 676, Lot 1 (City's Count # 19), 601 West 30th Street.** The City identified this lot in gold on its 1995 Map as permissible but "encumbered." It remains in a legally permissible zone. It is not currently within 500 feet of any disqualifying zone or use. Much of this lot consists of land which the Planning Department describes as "Open space" dedicated to pedestrians. The High Line runs through it as well. It remains encumbered and/or otherwise unavailable to any commercial use today because the lot is entirely within the Western Yard of the Hudson Yards Development, which is currently at the very earliest stages of preconstruction development, and completion will not occur for several years. Additionally, a public school will be built in the middle of this lot which will disqualify any adult use on the lot. This lot should be excluded as encumbered and/or unavailable for any commercial uses and by virtue of its proximity to a school.

I show directly below selected photos of this lot, including both those which I took personally and one obtained from Google Earth, as well as a localized map showing both where this lot is located and the boundaries of this lot in a red border as an overlay to the map. The Google Earth photo also shows the lot boundaries in a red border.

(3) Block 676, Lot 1 (City's Count # 19), 601 West 30th Street:



LOOKING SOUTH



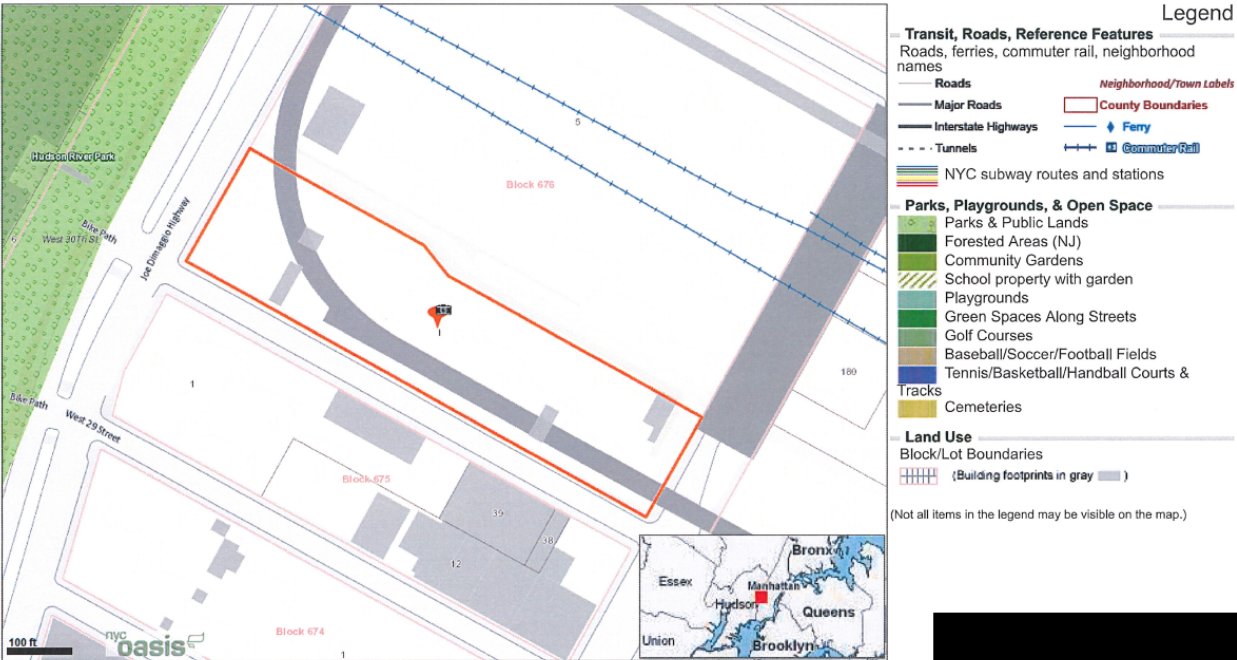
LOOKING EAST

(3) Block 676, Lot 1 (City's Count # 19), 601 West 30th Street:



LOOKING WEST

Block: 676, Lot: 1



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(4) **Block 702, Lot 150 (City's Count # 20), 560 West 33rd Street.** The City identified this lot in gold on its 1995 Map as permissible but "encumbered." It remains in a legally permissible zone. It is not within 500 feet of any disqualifying zone. It is within the Hudson Yards Development. The lot is to be used for a large high-rise residential tower currently under construction which will have retail stores on its first and second floors. It appears that occupancy will likely commence by the end of 2019. The lot would be a legally permissible location for an adult use but for the proximity of the planned public school to be built in the contiguous lot to the south (Block 676, Lot 1, City Count # 19, 601 W. 30th Street) which will eliminate all portions of the lot where the entrances for retail uses must likely be built, as best I can determine. Because of the proximity to a planned public school of the virtually certain location of the entrance doors for all contemplated retail uses, it appears that this location would be legally impermissible for any new adult use and should be excluded for that reason. Additionally, because of the nature of the uses for which the structure has been designed (i.e., as a primarily residential structure with a small amount of commercial on the lower floors), there is no realistic likelihood it will be available for any adult use. This lot should be excluded for the foregoing reasons.

I show directly below selected photos of this lot, including both those which I took personally and one obtained from Google Earth, as well as a localized map showing both where this lot is located and the boundaries of this lot in a red border as an overlay to the map.

(4) Block 702, Lot 150 (City's Count # 20), 560 West 33rd Street:



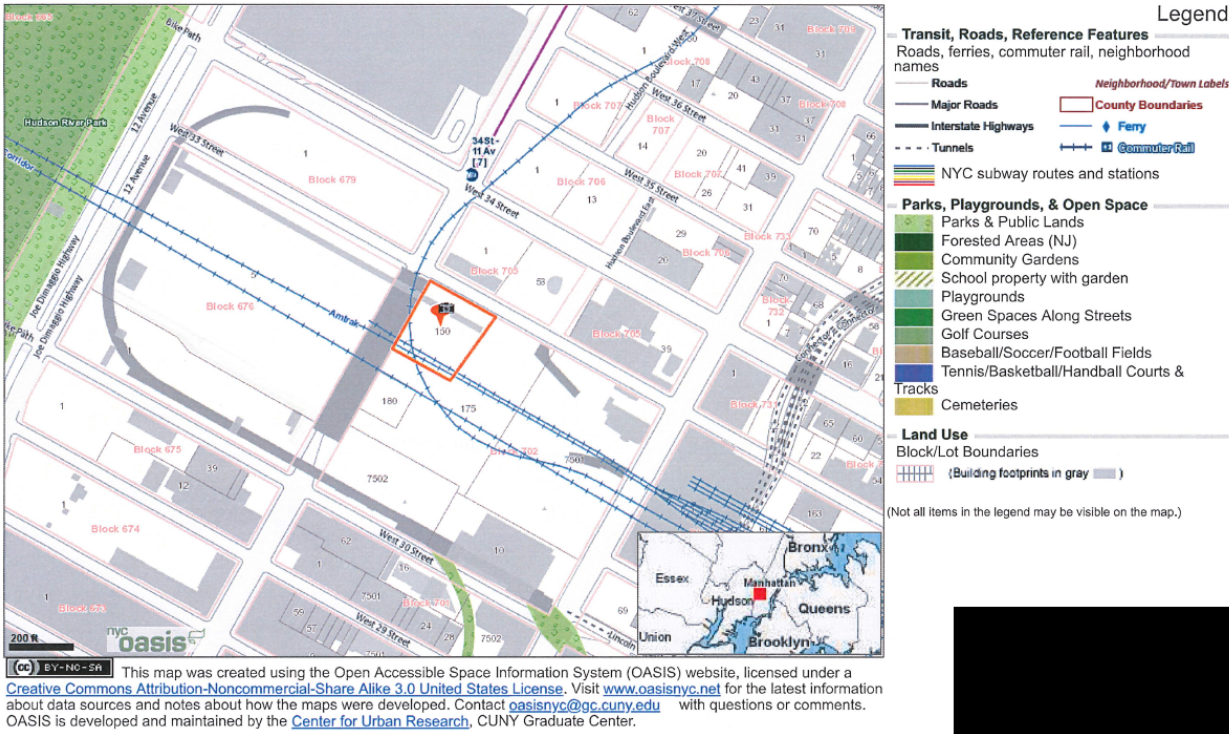
LOOKING NORTH



LOOKING EAST

(4) Block 702, Lot 150 (City's Count # 20), 560 West 33rd Street:

Block: 702, Lot: 150



(5) **Block 702, Lot 175 (City's Count # 21), 530 West 33rd Street.** The City identified portions of this lot in gold on its 1995 Map as permissible but "encumbered" and showed other portions of the lot in white as not then legally permissible. It remains in a legally permissible zone, but only a *portion* of it is legally permissible due to proximity to school #24 on my prior Map "1-E". It is within the Hudson Yards Development. It remains fully encumbered and/or otherwise unavailable to any commercial use because it is a dedicated open-space plaza. This lot should be excluded because it is fully encumbered and/or otherwise unavailable for any commercial use.

I show directly below selected photos of this lot, including both those which I took personally and one obtained from Google Earth, as well as a localized map showing both where this lot is located and the boundaries of this lot in a red border as an overlay to the map.

(5) Block 702, Lot 175 (City's Count # 21), 530 West 33rd Street:



LOOKING NORTH



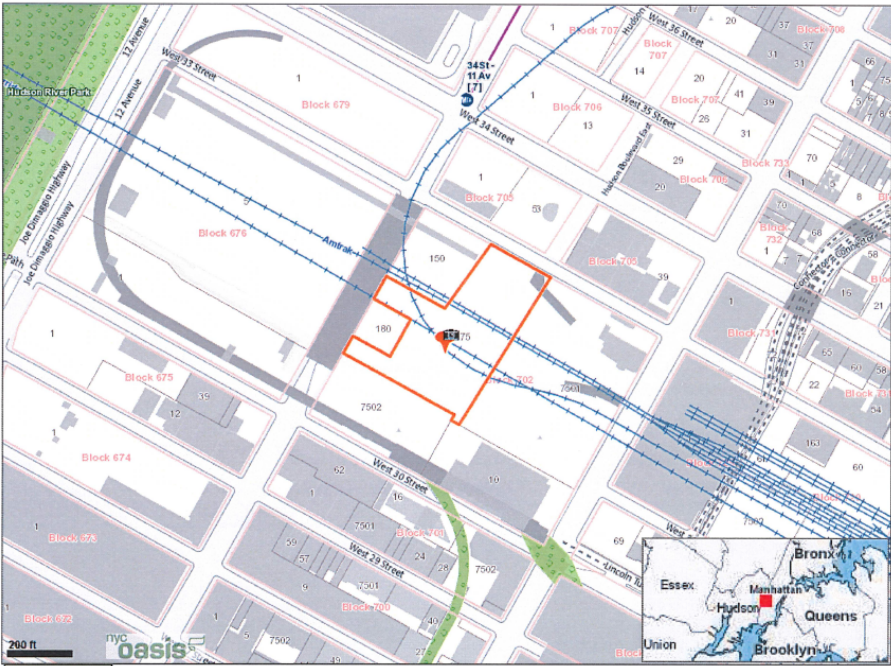
LOOKING SOUTH

(5) Block 702, Lot 175 (City's Count # 21), 530 West 33rd Street:



LOOKING EAST

Block: 702, Lot: 175

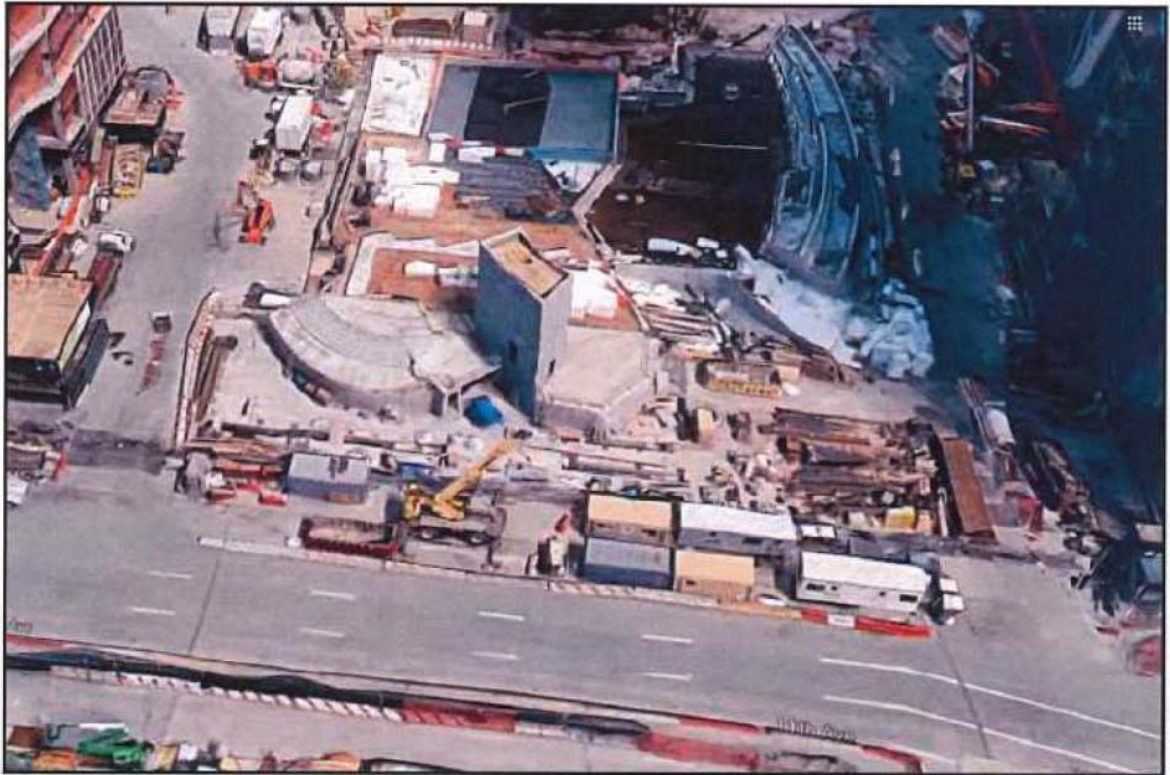


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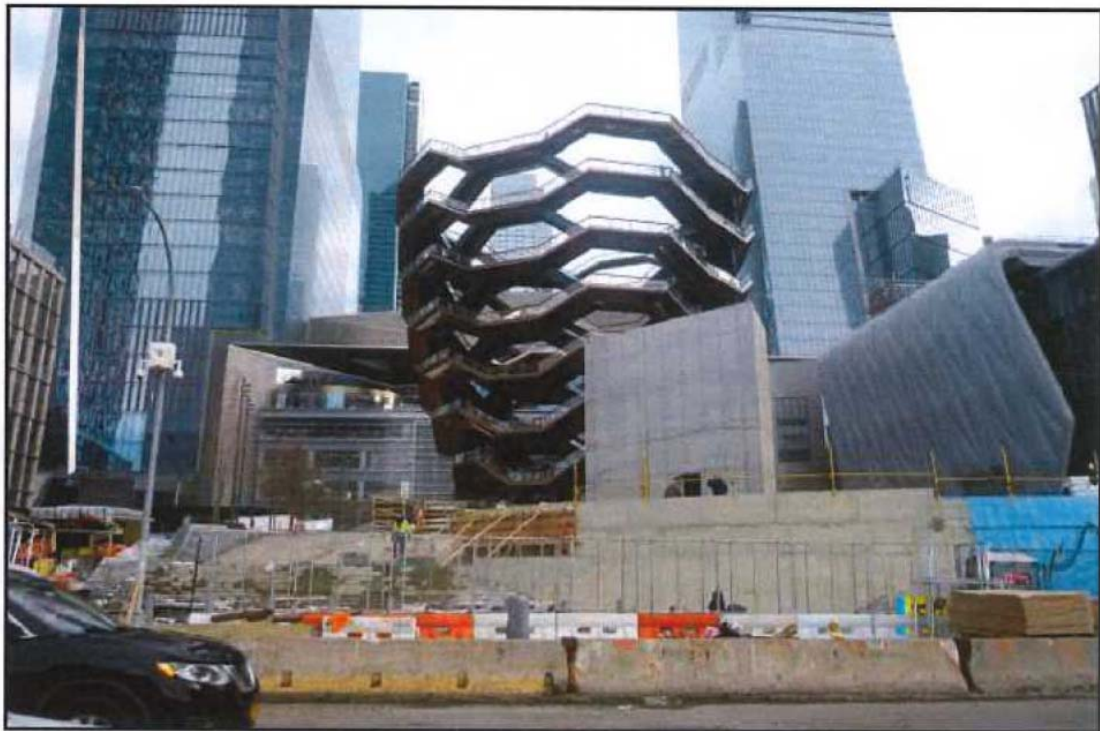
(6) **Block 702, Lot 180 (City's Count # 22), 342 West 33rd Street.** The City identified this lot in gold on its 1995 Map as permissible but "encumbered." It remains in a legally permissible zone, but only a *portion* of it is legally permissible due to proximity to school #24 on my prior Map "1-E". It is within the Hudson Yards Development. The lot today is vacant land covered by a concrete deck and dedicated as open space. The entirety of the lot is encumbered and/or otherwise unavailable to any commercial use and, for that reason, should be excluded.

I show directly below selected photos of this lot, including both those which I took personally and one obtained from Google Earth, as well as a localized map showing both where this lot is located and the boundaries of this lot in a red border as an overlay to the map.

(6) Block 702, Lot 180 (City's Count # 22), 342 West 33rd Street:



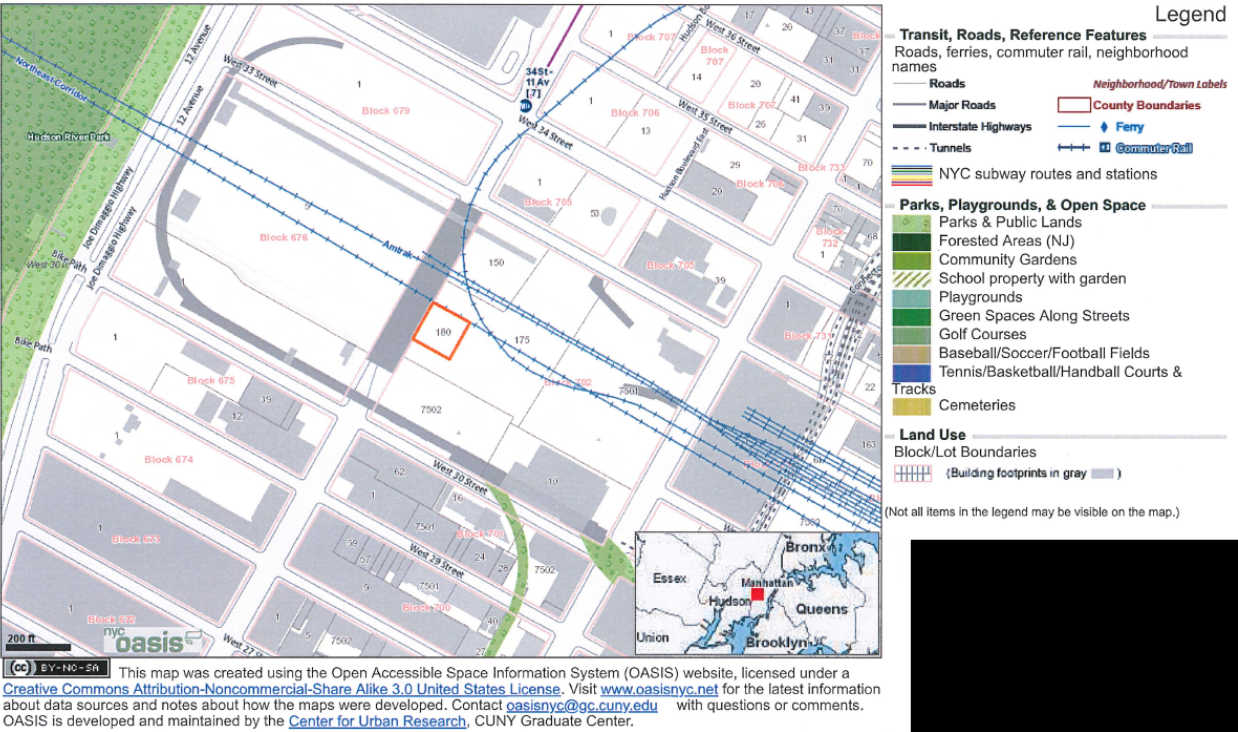
LOOKING EAST



LOOKING EAST

(6) Block 702, Lot 180 (City’s Count # 22), 342 West 33rd Street:

Block: 702, Lot: 180



(7) **Block 705, Lot 1 (City's Count # 23), 380 11th Avenue.** A portion of this lot was shown on the 1995 City Map in a purple color (the remainder in white), indicating that a portion was then in a legally permissible manufacturing district which did not then allow residential. The entirety of the lot is now in an unusual legally permissible commercial district within the Hudson Yards District, Subdistrict A, Subarea A2, where both residential and adult uses are allowed. Nonetheless, although the lot is now legally permissible for adult, it is fully occupied by a high-rise hotel with limited commercial use, and not commercially feasible for any adult use. Consequently, although this is a legally permissible lot, it should be excluded because there is no realistic likelihood it will be available for any adult use.

I show directly below selected photos of this lot, including both those which I took personally and one obtained from Google Earth, as well as a localized map showing both where this lot is located and the boundaries of this lot in a red border as an overlay to the map.

(7) Block 705, Lot 1 (City's Count # 23), 380 11th Avenue:



LOOKING SOUTH



LOOKING EAST